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March 30, 2020

VIA E-MAIL (MGLENN@HOLLANDHART.COM)

Marcy Glenn
Chair, Colorado Supreme Court Standing Committee on the Rules of Professional Conduct
Holland & Hart
555 17th Street, Suite 3200
Denver, CO 80202

Re: Initial Report of the Abandoned Estate Planning Documents Subcommittee

Dear Marcy:

On behalf of the Abandoned Estate Planning Documents Subcommittee, I am pleased to submit an initial report with our recommendation to revise comments to two of the Rules of Professional Conduct. These revisions are intended to clarify that a lawyer's use of the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act (the "Act") does not violate the duty of client confidentiality under Rule 1.6 or the duty to safeguard client property under Rule 1.15A.

The Subcommittee has met three times since it formed in late January (it met twice by telephone given recent restrictions on in-person meetings to address the COVID-19 crisis). During our three meetings, we received valuable assistance from five guest members with subject matter expertise in both estate planning practice generally and the Act itself: Tim Bounds, Frank Hill, Stan Kent, Marianne Luu-Chen, and Herb Tucker. These guest members of the Subcommittee will be available to answer questions at the upcoming April 3 meeting of the full Standing Committee.

With this letter, I am including the following materials:

- **Analyses of Rules 1.6, 1.15A, and 1.16A**: The Subcommittee authored two memoranda to explain the need for our proposed comment revisions. These analyses represent the consensus of all ten members of the Subcommittee. *See* pp. 28–32.

- **Rules 1.6 and 1.15A, Redlined with Proposed Comment Revisions**: Also attached are redlined versions of Rule 1.6 and 1.15A, which reflect the Subcommittee's proposed comment revisions. *See* pp. 33–41.

For additional background information regarding the Act, I refer you to pages 80–111 of the meeting materials distributed for the January 10, 2020 meeting of the full Standing Committee.

Sincerely,

Frederick R. Yarger

SUBCOMMITTEE ROSTER:

- Fred Yarger (Subcommittee Chair)
- Cecil Morris
- Alec Rothrock
- Dave Stark
- Jessica Yates
- Tim Bounds (Guest Member)
- Frank Hill (Guest Member)
- Stan Kent (Guest Member)
- Marianne Luu-Chen (Guest Member)
- Herb Tucker (Guest Member)

ANALYSIS OF COLO. RPC 1.6

During its meetings of March 3, 17, and 27, 2020, the Subcommittee discussed the need to analyze whether amendments to the text or comments of the confidentiality rule, Colo. RPC 1.6, would be necessary to allow attorneys to avail themselves of the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act (the "Act"). The central provision of Rule 1.6, paragraph (a), provides as follows:

> A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is [otherwise] permitted by [Rule 1.6].

As Comment [3] to Rule 1.6 explains, "The confidentiality rule … applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."

Disclosures Required to Use the Act: Under the Act, a lawyer "custodian" of an abandoned estate planning document is required to make certain limited disclosures of "information relating to the representation of a client" in order to transmit an electronic estate planning document to the State Court Administrator for filing and retention. Specifically, the lawyer-custodian must disclose to the State Court Administrator (1) the identity and address of the custodian; (2) the identity and all aliases of the creator of the document, the creator's date of birth, and the last-known mailing and physical addresses of the creator; (3) the fact that an abandoned estate planning document exists for that creator; and (4) the abandoned estate planning document itself. C.R.S. § 15-23-111.

For its part, the State Court Administrator makes available in its publicly searchable database *only* the name, known aliases, and last known physical address of the creator. *See* C.R.S. §§ 15-23-114(2) and 15-23-117(1). By including the creator's name, known aliases, and last known physical address in its publicly searchable database, the State Court Administrator thereby discloses only the fact that a particular person prepared an (unidentified) estate planning document, which document had been abandoned. All other information about the creator, the custodian, and the identity and content of the creator's document electronically filed with the State Court Administrator is not accessible to the public. C.R.S. § 15-23-117(2).

The identity and content of the creator's document filed with the State Court Administrator remains strictly confidential and subject to disclosure only as provided under the Act. Before notification of the creator's death, access to the content of the creator's document filed with the State Court Administrator is restricted to a class of authorized recipients (including the creator). C.R.S. § 15-23-119. After notification of the creator's death, access to the content of the creator's document is limited to another highly restricted class of authorized recipients. C.R.S. § 15-23-120.

The relevant questions, then, are whether the above-described disclosures of "information relating to the representation" necessary to utilize the Act are permitted by Rule 1.6, whether any revisions should be made to Rule 1.6 to ensure lawyers can use the Act without running afoul of

the Rule, and whether any revisions should be made to the Comments to Rule 1.6 to clarify that the Rule already permits them to do so. Our research has not revealed any other jurisdiction that has made revisions to a rule comparable to Colo. RPC 1.6 in response to a law similar to the Act. Thus, the answer to these questions must be based on an analysis of the Colorado Rules of Professional Conduct alone.

Informed Consent Will Not Apply to Existing Abandoned Estate Planning Documents: Because the Act was only recently signed into law, "creators" of currently existing abandoned estate planning documents will not have given "informed consent" to their lawyer-custodians to make the disclosures necessary for the lawyer-custodian to use the Act. Perhaps in the future, as more estate planning lawyers in Colorado become familiar with the Act, they will advise their clients about the Act and even inform their clients through retention agreements that they will use the Act if necessary in the future. Doing so may create informed consent on the part of future client-creators. But it will not resolve current situations in which lawyer-custodians seek to use the Act to file abandoned estate planning documents with the State Court Administrator.

Disclosures Under the Act Appear To Be "Impliedly Authorized": The Subcommittee agrees, however, that disclosures made pursuant to the Act appear to be "impliedly authorized" within the meaning of Rule 1.6. As Comment [5] to the Rule explains, "a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation," unless "the client's instructions or special circumstances limit that authority." The Comment goes on to explain that "[i]n some situations, for example, a lawyer may be impliedly authorized … to make a disclosure that facilitates a satisfactory conclusion to a matter."

One purpose of the Act is to "facilitate" an orderly and "satisfactory conclusion" to representation of a client-creator who has abandoned an estate planning document in the possession of the lawyer-custodian. Use of the Act increases the likelihood that the client-creator's wishes expressed in an estate planning document, and the rights of beneficiaries named in an estate planning document, will be honored. Indeed, case law suggests that, in some circumstances, disclosure of documents and other information related to a deceased client's estate does not violate Rule 1.6. *See In re Estate of Rabin*, 2018 COA 182 ¶¶ 23, 29, *cert. granted*, 2019 WL 4640246 (Colo. Sept. 23, 2019) (explaining, albeit not under an "implied authorization" theory, that disclosure of client files to a personal representative of a estate, after the testator's death, does not violate the attorney-client privilege or Rule 1.6).

Under the Act, disclosures of information relating to the representation of a client are strictly limited and are tailored specifically to facilitating the delivery of an abandoned estate document into the hands of a limited class of individuals who have a clear and established right to obtain the document. *Cf*. CBA Op. 132, "Duties of Confidentiality of Will Drafter upon Death of Testator" (2017) (opining that disclosing the substance of "a deceased client's testamentary wishes" without express consent would violate Rule 1.6, but not opining on more limited disclosures like those contemplated by the Act). Without the limited disclosures contemplated by the Act, a "satisfactory conclusion" to the representation may not occur, because the abandoned estate document may never be delivered to the limited class of individuals who are entitled to the document and who could ensure the testator's wishes, and beneficiaries' rights, are honored. The limited disclosures contemplated by the Act may thus serve to avoid prejudice to a client who can no longer be located. *Cf.* CBA Op. 128, "Ethical Duties of Lawyer Who Cannot Contact

Client" (2015) ("In determining the extent of actions a lawyer may take on behalf of an absent client, the primary consideration should be avoiding prejudice to the client to the extent feasible.").

Based on this analysis, revisions to Rule 1.6 itself appear unnecessary and potentially counterproductive. Revising the Rule may imply that disclosures necessary to use the Act are not "impliedly authorized" under the Rule's current language, which could lead to a narrower interpretation of the "impliedly authorized" provision than is warranted. Revisions to the Comment, however, may be warranted to clarify to practitioners that use of the Act is permitted under the Rule.

Proposed Revision to Comment [5] to Rule 1.6: The Subcommittee drafted the following proposed revision to Comment [5] that would explicitly mention the Act and explain that disclosures made pursuant to the Act are encompassed within the "impliedly authorized" exception to Rule 1.6:

> [5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter**, including disclosures made by the lawyer pursuant to the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act**. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

# # #

ANALYSIS OF COLO. RPC 1.15A and 1.16A

During its meetings of March 17 and 27, 2020, the Subcommittee discussed the need to analyze whether amendments to Colorado RPC 1.15A and 1.16A or their comments would be necessary to allow attorneys to avail themselves of the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act (the "Act").

Rule 1.15A(a) provides:

> (a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in trust accounts maintained in compliance with Rule 1.15B. *Other property shall be appropriately safeguarded.* Complete records of such funds and other property of clients or third parties shall be kept by the lawyer in compliance with Rule 1.15D.

Colo. RPC 1.15A(a) (emphasis added).

Comment [1] to Rule 1.16A, which references Rule 1.15A, defines "property" as "jewelry and other valuables entrusted to the lawyer by the client, as well as documents having intrinsic value or directly affecting valuable rights, such as securities, negotiable instruments, deeds, and wills." This comment further provides that "[a] lawyer's obligations with respect to client 'property' are distinct [from a lawyer's obligations regarding a client's files]" and that obligations with respect to client property "are addressed in Rules 1.15A and 1.16(d)," the latter of which describes the duty of a lawyer to "surrender" client property upon termination of representation.

As Comment [1] to Rule 1.16A makes clear, a client's original estate planning documents (including, for example, a will) are considered "client property." The lawyer, as custodian of the client's original estate planning documents, has a fiduciary duty to hold (or "safeguard") those documents under Rule 1.15A(a). The Act, meanwhile, creates a procedure to determine whether an original estate planning document is abandoned and, if so, provides a process to convert the original document to an electronic format, store it with the State Court Administrator's Office, and destroy the original. C.R.S.§ 15-23-115.

Revisions to Rule 1.16A appear to be unnecessary. That rule deals with client files, not client property, and there is no need to revise the definition of client property in Comment [1] to Rule 1.16A.

However, the Subcommittee recommends that an additional comment be added to Rule 1.15A that explicitly mentions the Act and indicates that a lawyer does not violate the ethical obligation to safeguard client property by complying with the Act. The act of destroying an original estate planning document, such as a will, seems antithetical to the duty to safeguard client property, but if it is done in accordance with the Act, it is actually a method of safeguarding the document. Accordingly, the Subcommittee proposes the following additional Comment [8] to be added to the Comments associated with Rules 1.15A–1.15E:

Note: The following ~~six~~**eight** comments are applicable to this Rule 1.15A and to Rule 1.15B, Rule 1.15C, Rule 1.15D, and Rule 1.15E.

[8] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. A lawyer's compliance with the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act is consistent with the lawyer's duty to safeguard property in paragraph 1.15A(a).

The first two sentences of this proposed new Comment [8] appeared in the Comments to former Colo. RPC 1.15 until that rule was revised extensively in 2014. They derive verbatim from Comment [1] to ABA Model Rule 1.15. These sentences introduce the subject of the safeguarding of property in the Comments to Rules 1.15A–1.15E, which currently do not refer to this principle. The third sentence refers to the Act and serves as an example of safeguarding client property.

Like Rule 1.15A(a), ABA Model Rule 1.15(a) refers to "safeguarding" client property. However, Comment [1] to ABA Model Rule 1.15—and, likewise, the second sentence of the new proposed Comment [8]—uses the word "safekeeping," at least in reference to securities. "Safeguarding" and "safekeeping" appear to be interchangeable. The third sentence of proposed Comment [8] uses the word "safeguarding" because that is the term used in Rule 1.15A(a).

Finally, there is a note that prefaces the Comments to Rules 1.15A–1.15E. It states, unintentionally, that the following "six" comments are applicable to these rules. This note should have been changed to "seven" upon the addition of Comment [7]. If the Committee approves the addition of proposed Comment [8], this note should read "eight."

# # #

PROPOSED COMMENT REVISIONS
(REDLINE)

Colo. RPC 1.6

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to reveal the client's intention to commit a crime and the information necessary to prevent the crime;

(3) to prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(4) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(5) to secure legal advice about the lawyer's compliance with these Rules, other law or a court order;

(6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information is not protected by the attorney-client privilege and its revelation is not reasonably likely to otherwise materially prejudice the client; or

(8) to comply with other law or a court order.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with

respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter, including disclosures made by the lawyer pursuant to the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[6A] Paragraph (b)(2) permits disclosure regarding a client's intention to commit a crime in the future and authorizes the disclosure of information necessary to prevent the crime. This paragraph does not apply to completed crimes. Although paragraph (b)(2) does not require the lawyer to reveal the client's intention to commit a crime, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[7] Paragraph (b)(3) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(3) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(4) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(4) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules, other law, or a court order. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(5) permits such disclosure because of the importance of a lawyer's compliance with these Rules, other law, or a court order. For example, Rule 1.6(b)(5) authorizes disclosures that the lawyer reasonably believes are necessary to seek advice involving the lawyer's duty to provide competent representation under Rule 1.1. In addition, this rule permits disclosure of information that the lawyer reasonably believes is necessary to secure legal advice concerning the lawyer's broader duties, including those addressed in Rules 3.3, 4.1 and 8.4.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(6) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(6) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(7) permits the lawyer to make such disclosures as are necessary to comply with the law.

Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent

reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if the information is protected by the attorney-client privilege or its disclosure is reasonably likely to materially prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[15] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. For purposes of paragraph (b)(8), a subpoena is a court order. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(8) permits the lawyer to comply with the court's order.

[15A] Rule 4.1(b) requires a disclosure when necessary to avoid assisting a client's criminal or fraudulent act, if such disclosure will not violate this Rule 1.6.

[16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[16A] The interrelationships between this Rule and Rules 1.2(d), 1.13, 3.3, 4.1, 8.1, and 8.3, and among those rules, are complex and require careful study by lawyers in order to discharge their sometimes conflicting obligations to their clients and the courts, and more generally, to our system of justice. The fact that disclosure is permitted, required, or prohibited under one rule does not end the inquiry. A lawyer must determine whether and under what circumstances other

rules or other law permit, require, or prohibit disclosure. While disclosure under this Rule is always permissive, other rules or law may require disclosure. For example, Rule 3.3 requires disclosure of certain information (such as a lawyer's knowledge of the offer or admission of false evidence) even if this Rule would otherwise not permit that disclosure. In addition, Rule 1.13 sets forth the circumstances under which a lawyer representing an organization may disclose information, regardless of whether this Rule permits that disclosure. By contrast, Rule 4.1 requires disclosure to a third party of material facts when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless that disclosure would violate this Rule. See also Rule 1.2(d)(prohibiting a lawyer from counseling or assisting a client in conduct the lawyer knows is criminal or fraudulent). Similarly, Rule 8.1(b) requires certain disclosures in bar admission and attorney disciplinary proceedings and Rule 8.3 requires disclosure of certain violations of the Rules of Professional Conduct, except where this Rule does not permit those disclosures.

[17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b) (1) through (b)(7). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule.

Reasonable Measures to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to make reasonable efforts to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Comments [3] and [4] to Rule 5.3.

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming

into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Colo. RPC 1.15A

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in trust accounts maintained in compliance with Rule 1.15B. Other property shall be appropriately safeguarded. Complete records of such funds and other property of clients or third parties shall be kept by the lawyer in compliance with Rule 1.15D.

(b) Upon receiving funds or other property of a client or third person, a lawyer shall, promptly or otherwise as permitted by law or by agreement with the client or third person, deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, promptly upon request by the client or third person, render a full accounting regarding such property.

(c) When in connection with a representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until there is a resolution of the claims and, when necessary, a severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(d) The provisions of Rule 1.15B, Rule 1.15C, Rule 1.15D, and Rule 1.15E apply to funds and other property, and to accounts, held or maintained by the lawyer, or caused by the lawyer to be held or maintained by a law firm through which the lawyer renders legal services, in connection with a representation.

Comment

Note: The following ~~six~~eight comments are applicable to this Rule 1.15A and to Rule 1.15B, Rule 1.15C, Rule 1.15D, and Rule 1.15E.

[1] Trust accounts containing funds of clients or third persons held in connection with a representation must be interest-bearing or dividend-paying for the benefit of the clients or third persons or, if the funds are nominal in amount or expected to be held for a short period of time, for the benefit of the Colorado Lawyer Trust Account Foundation ("COLTAF"). A lawyer should exercise good faith judgment in determining initially whether funds are of such nominal amount or are expected to be held by the lawyer for such a short period of time that the funds should not be placed in an interest-bearing account for the benefit of the client or third person. The lawyer should also consider such other factors as (i) the costs of establishing and maintaining the account, service charges, accounting fees, and tax report procedures; (ii) the nature of the transaction(s) involved; and (iii) the likelihood of delay in the relevant proceedings. A lawyer should review at reasonable intervals whether changed circumstances require further action respecting the deposit of such funds, including without limitation the action described in paragraph 1.15B(i).

[2] If a lawyer or law firm participates in Interest on Lawyer Trust Account ("IOLTA") programs in more than one jurisdiction, including Colorado, IOLTA funds that the lawyer or law firm holds in connection with the practice of law in Colorado should be held in the lawyer or law firm's COLTAF account (as defined in Rule 1.15B(2)(b)). The lawyer or law firm should exercise good faith judgment in determining which IOLTA funds it holds in connection with the practice of law in Colorado.

[3] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

[4] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. See Rule 1.16(d) for standards applicable to retention of client papers.

[6] The duty to keep separate from the lawyer's own property any property in which any other person claims an interest exists whether or not there is a dispute as to ownership of the property. Likewise, although the second sentence of Rule 1.15A(c) deals specifically with disputed ownership, the first sentence of that provision applies even if there is no dispute as to ownership.

[7] What constitutes "reasonable efforts," within the meaning of Colo. RPC 1.15B(k), will depend on whether the lawyer does not know the identity of the owner of certain funds held in a

COLTAF account, or the lawyer knows the identity of the owner of the funds but not the owner's location or the location of a deceased owner's heirs or personal representative. When the lawyer does not know the identity of the owner of the funds or a deceased owner's heirs or personal representative, reasonable efforts include an audit of the COLTAF account to determine how and when the funds lost their association to a particular owner or owners, and whether they constitute attorneys' fees earned by the lawyer or expenses to be reimbursed to the lawyer or a third person. When the lawyer knows the identity but not the location of the owner of the funds or the location of the owner's heirs or personal representative, reasonable efforts include attempted contact using last known contact information, reviewing the file to identify and contact third parties who may know the location of the owner or the owner's heirs or personal representative, and conducting internet searches. After making reasonable but unsuccessful efforts to identify and locate the owner of the funds or the owner's heirs or personal representative, a lawyer's decision to continue to hold funds in a COLTAF or other trust account, as opposed to remitting the funds to COLTAF, does not relieve the lawyer of the obligation to maintain records pursuant to Rule 1.15D(a)(1)(A) or to determine whether it is appropriate to maintain the funds in a COLTAF account, as opposed to a non-COLTAF trust account, pursuant to Colo. RPC 1.15B(b). When COLTAF has made a refund to a lawyer following the lawyer's determination of the identity and the location of their owner or the identity and location of the owner's heirs or personal representative, the lawyer's obligations with respect to those funds are set forth in Colo. RPC 1.15A or are subject to applicable probate procedures or orders. The disposition of unclaimed funds held in the COLTAF account of a deceased lawyer is to be determined in accordance with written procedures published by COLTAF.

[8] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. A lawyer’s compliance with the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act is consistent with the lawyer’s duty to safeguard property in paragraph 1.15A(a).